KARPAL SINGH

v.

MENTERI HAL EHWAL DALAM NEGERI, MALAYSIA & ORS.

HIGH COURT MALAYA, PENANG
WAN ADNAN J
[ORIGINATING SUMMONS NO. 24-94-89]
26 JUNE 1989

CRIMINAL PROCEDURE: *Detention orders - Cancellation - Costs - Section 5(2) Internal Security (Amendment) Act 1988.*

CRIMINAL PROCEDURE: *Costs in criminal proceedings - Jurisdiction - Merits of the case - Discretion of Courts.*

On 18 December 1987, the 1st defendant issued a detention order against the plaintiff pursuant to s. 8(1) of the Internal Security Act 1960 (ISA). This order was later conditionally suspended and finally cancelled. Prior to cancellation, the plaintiff sought declaratory orders and costs.

Held:

[1] With the cancellation of the detention order, the orders sought by the plaintiff will not in any way affect the position of the parties.

[2] The discretion of the Court to grant costs must be exercised judicially and in accordance with well-settled principles. Before a Court can make an order as to costs there must be sufficient material before the Court to enable it to exercise the discretion judicially; one has to examine the merits of each case.

[3] Although the decision on the merits of the application will not affect the position of the parties so far as the declarations are concerned, this is one case where the Court will have to consider the merits of the application in order to make a costs order.

[4] The prohibition in s. 5(2) of the Internal Security (Amendment) Act 1988 is only "for or on acount of, or in respect of, anything lawfully done in relation to the detention order or detention declared lawful and valid under subsection (1); it refers specifically to the detention order or the detention under subsection (1) and does not apply in other cases.

[Preliminary objections of defendants overruled. Plaintiff allowed to make application.]

Cases referred to:

Sun Life Assurance Company of Canada v. Jervis [1944] AC 112
Ainsbury v. Millington [1987] 1 All ER 929
Loknath Padhan v. Birendra Kumar [1974] AIR SC 505
Mohamed Noor bin Othman & Ors. v. Haji Mohamed Ismail bin Haji Ibrahim & Ors. [1988] 1 CLJ (Rep) 224
Petroliam Nasional Bhd. (Petronas) & Anor. v. Cheah Kam Chiew [1987] 1 MLJ 25

Legislation referred to:

Internal Security Act 1960, s. 8(1)
Internal Security (Amendment) Act 1988, ss. 5(2), 81(3)
Rules of the High Court 1980, O. 59 r. 3(2)

For the plaintiff - Karpal Singh a/l Ram Singh; M/s. Karpal Singh & Co. (Defending himself)
For the 1st - 4th defendants - T. Selventhiranathan, Ketua Bahagian Guaman, Jabatan Peguam Negara

JUDGMENT

Wan Adnan J:

This is an application by way of an originating summons for some declaratory orders and costs.

The plaintiff was detained under the detention order dated 18 December 1987 issued by the first defendant pursuant to s. 8(1) of the Internal Security Act 1960. Subsequently on 25 January 1989 an order under s. 10 of the Act was made suspending the detention order subject to certain conditions. The plaintiff was consequently released from detention. Then by order dated 19 April 1989 the detention order was cancelled, thus removing all conditions imposed.

This application was filed on 10 February 1989.

At the start of the hearing the learned Senior Federal Counsel appearing for the defendants raised two preliminary objections, namely:

(1) The matter has become academic. The application should be struck out.

(2) There is no right to bring this action by virtue of s. 5(2) of the Internal Security (Amendment) Act 1988. The application should be dismissed.

A number of authorities were cited to support the proposition that a Court should not undertake to decide an issue unless it is a living issue between the parties.

Viscount Simon LC in the case of *Sun Life Assurance Company of Canada v. Jervis* [1944] AC p. 112 HL says:

> My Lords, in my opinion, the House should decline to hear this appeal on the ground that there is no issue before us to be decided between the parties ... The respondent will be in exactly the same position in either case. He has nothing to fight for, because he has already got everything that he can possibly get, however the appeal turns out, and cannot be deprived of it. I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing list between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellants hope to get decided in their favour without in any way affecting the position of the parties ... I think it is an essential quality of the appeal fit to be disposed of by the House that there should exist between the parties a matter in actual controversy which the House undertakes as a living issue.

The principle was followed in another House of Lords case of *Ainsbury v. Millington* [1987] 1 All ER 929.

Bhagwati J in *Loknath Padhan v. Birendra Kumar* AIR [1974] Supreme Court 505 said:

> It is a well settled practice recognised and followed in India as well as England that a Court should not undertake to decide an issue, unless it is a living issue between the parties.

In *Mohamed Noor bin Othman & Ors. v. Haji Mohamed Ismail bin Haji Ibrahim & Ors.* [1988] 1 CLJ (Rep) 224 Hashim Yeop A. Sani SCJ (as he then was) on behalf of the Supreme Court said:

> More importantly, before a Court makes a declaration there must be persons or a body as the proper or lawful recipient of the benefits of the declaration. The Court does not act in vain.

I do agree that with the cancellation of the detention order made pursuant to s. 81(3) of the Act the granting of all the declarations prayed for in the originating summons will not in any way affect the position of the parties. The plaintiff will be in exactly the same position whatever the outcome of the determination of the issues. But unfortunately the matter does not end there. The plaintiff is asking for costs. The detention order was cancelled only after the filing of the application. The Court has to make an order as to costs.

It has long been settled that costs are in the discretion of the Court. But the discretion must be exercised judicially and in accordance with well-settled principles. Hashim Yeop A. Sani SCJ (as he then was) on behalf of the Supreme Court in *Petroliam Nasional Bhd. (Petronas) & Anor. v. Cheah Kam Chiew* [1987] 1 MLJ 25 said referring to O. 59 r. 3(2) of the Rules of the High Court 1980:

> The general principle envisaged in the rule is simply that costs follow the event and that the successful party is entitled to be paid his costs except when it appears to the Court that in the circumstances of the case some other order should be made ...
>
> To summarise, an appellate Court does not interfere in the question of costs without reluctance. This is because the Court below has an absolute discretion except that the discretion must be exercised judicially. An appellate Court should not interfere unless it can be shown that there has been an error of law or the purported exercise of discretion was based on grounds wholly unconnected with the cause of action.

It is therefore evident that before a Court can make an order as to costs there must be sufficient material before the Court to enable it to exercise the discretion judicially. In the case of *Petroliam Nasional Bhd. (Petronas) v. Cheah Kam Chiew* (*supra*) the trial Judge awarded the costs in favour of the applicant without going into the merits of the case. There was no need to. There were no merits to go into. By the time the application came up for hearing the applicant could no longer dispute that he had no cause of action since the Petroleum Development (Amendment) Act 1985 was made to have retrospective effect thus taking away the very basis on which the applicant relied for his application. There were sufficient grounds upon which the trial Judge could base for the exercise of his discretion. In the present case, how else can the Court exercise the discretion judicially if not by going into the merits of the application. Although the application was made before the cancellation of the detention order it would not be proper to award costs against the defendants. It could be that there are no merits in the application and the application will fail. On the other hand it is not proper not to award costs to the plaintiff if there are merits in the application since the application was made before the cancellation of the order.

I was referred by the plaintiff to the decision of the Supreme Court of South Africa in the case of *Curtis Ephraim Nkondo v. Minister of Law and Order*. The relevant passage of the decision states:

> The applicants in the first and third cases have long since been released from detention but it remains necessary to decide whether the notices which were issued in those cases - and also the notices in the second case - were validly issued and, depending on the outcome of the appeals, to make appropriate orders as to costs.

The learned Senior Federal Counsel referred me to the notes of proceedings recorded by Abdul Hamid LP and Mohd Yusoff bin Mohamed SCJ in the case of *George Samuel David v. The Government of Malaysia & 2 Ors.* Supreme Court Civil Appeal No. 281 of 1987 which are as follows respectively:

Clement Skinner for A.
Lim Heng Seng, S.F.C. for Fed. Govt.

Lim - on a preliminary point.
Appeal should not proceed.

A has no longer any interest on the subject matter and that declaration sought is of no utility.

A has now retired on full pension - papers - marked "A".

Refers: I. Zamir - The declaratory judgment.
Letter from Dato Ibrahim - marked "C".
Clement Skinner:

Not aware of "C".
Appeal dismissed.
By consent no order as to costs.
Cost against A in lower Ct. set aside.
Sgd. Abdul Hamid
Lord President, Malaysia

C.A. Skinner for appellant
S.F.C. Lim Heng Seng

S.F.C. Says: Appellant is not proceeding with appeal since subject matter is no more of interest to him. Appellant has retired on full pension and also granted gratuity.

Skinner: Confirms the facts but would like to hear submission and decide as in *James Wong's* case.

Court: Appeal dismissed.

By consent: No order as to costs and costs against appellant in Court below is set aside.
sgd. Mohd. Yusoff

This decision is not relevant to the present case. In that case it was by consent that no cost was awarded.

It is my view that although the decision on the merits of the application will not affect the position of the parties so far as the declarations are concerned this is one case where the Court will have to consider the merits of the application in order to make an order as to costs. "The Court does not act in vain" is not applicable as the decision will determine the question of costs on the principle that costs follow the event.

The second objection calls for the interpretation of s. 5(2) of the Internal Security (Amendment) Act 1988.

For ease of reference the provisions of the subsection are produced below:

> (2) No action, suit, prosecution, or other legal proceeding whatsoever of any description or in any form, shall be brought, instituted or maintained in any Court on any ground after the commencement of this Act, or, if brought or instituted before the commencement of this Act, shall continue to be maintained, for or on account of, or in respect of, anything lawfully done in relation to the detention order or the detention declared lawful and valid under subsection (1), save that the provisions of this subsection shall not apply to any such legal proceeding which had concluded and the final decision of the Court in respect of which had been given before the commencement of this Act, or to any appeal in respect of such final decision.

The learned Senior Federal Counsel says that the subsection is of general application and that no action whatsoever can be brought in any Court on any ground whatsoever in respect of anything done in relation to detentions under the Act. By virtue of the subsection the plaintiff therefore has no right at all to make this application.

With due respect I cannot agree with his interpretation. In my view the subsection cannot bear out that interpretation. The prohibition is only "for or on account of, or in respect of, anything lawfully done in relation **to the detention order or detention declared lawful and valid under subsection (1)** ..." (Emphasis is added). It refers specifically to the detention order or the detention under subsection (1). It has no application in other cases. It does not preclude the plaintiff from making this application.

For the above reasons I overruled the preliminary objections.

Also found at [1990] 2 CLJ 397